90-1442

Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GARRET T. BUSH, III and HELEN F. BUSH,

Petitioners

versus

WATER POLLUTION CONTROL AUTHORITY
FOR THE TOWN OF WATERFORD,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Garret T. Bush, III
Pro Se
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QUESTIONS PRESENTED FOR REVIEW

1. In this federal civil action, that was brought to the court of first instance specifically under jurisdiction conveyed by Title 28 U.S.C. § 1343(a), did the presiding Judge of the United States District Court for the District of Connecticut violate plaintiffs' constitutional rights of equal protection and due process when he ordered dismissal of the Complaint at a preliminary hearing, sua sponte, on grounds that his Court seemed to lack subject matter jurisdiction?

2. Should Rule 12(h)(3) of the Federal Rules of Civil Procedure be struck down as unconstitutional because it permits abridgment of the right of due process of

law, as assured by Amendment XIV of the Constitution of the United States?

3. In the appeal of this federal civil action, brought to the United States Court of Appeals for the Second Circuit on several issues claiming abuse of discretion by the presiding District Judge, did the Appellate Panel violate plaintiffs' constitutional rights of equal protection and due process when it bypassed all issues on appeal, and yet affirmed the judgment by ordering dismissal on grounds of res judicata, on its own conclusions of fact, without benefit of a federal evidentiary hearing or an antecedent order on such grounds from a trial court?

LIST OF PARTIES TO THE PROCEEDINGS

All parties are identified in the caption of the case.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

There are no published reports of opinions delivered in this federal case.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

Date of the entry of judgment sought to be reviewed:

August 25, 1989
(ruling and order from the bench)
August 29, 1989
(judgment issued by the clerk)

Date of the order concerning a rehearing:

February 16, 1990 (filed)

Date of the order concerning the appeal:

September 19, 1990

Date of the order concerning a rehearing of the appeal:

December 12, 1990

Statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari:

Title 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution,
Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCS, §1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS §1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(June 25, 1948, ch 646, § 1, 62 Stat. 932; Sept. 3, 1954, ch 1263, §42, 68 Stat. 1241; Sept. 9, 1957, P.L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, P.L. 96-170, § 2, 93 Stat. 1284.)

42 USCS, §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

This civil suit was filed pro-se in the federal District Court by two citizens of the United States, husband and wife, seeking to redress the deprivation, under color of State law, of their right to hold property and receive equal protection of the laws, as secured by Amendment XIV, Section 1 of the Constitution of the United States.

Plaintiffs alleged that their federal rights had not been protected in the State courts and invoked jurisdiction in the federal court of first instance under Title 28, USCS, Section 1343(a).

Plaintiffs' Complaint was dismissed sua sponte by the presiding federal District Judge on reliance of Rule

12(h)(3) of the Federal Rules of Civil Procedure. There was no evidentiary hearing or written opinion.

The transcript of preliminary proceedings indicates that the presiding Judge believed that his Court lacked subject matter jurisdiction because there had been prior proceedings in the State courts of Connecticut.

The District Judge concluded, over plaintiffs' denials, that plaintiffs were seeking a review of the State court proceedings; that the District Court was required to give full faith and credit to the State court decision; and that plaintiffs' only recourse to a decision of the State courts lay in the U.S. Supreme Court.

Plaintiffs moved the District Court pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure to hold an evidentiary hearing for presentation of material made pertinent by the Court's issue of jurisdiction, and to reconsider the dismissal, noting that jurisdiction is conferred upon the District Court by Title 28, USCS, Section 1343(a), in concert with Title 42, USCS, Section 1983. The presiding Judge granted the motion, but did not provide for introduction of evidence. The Court remained convinced that its legal reasoning on dismissal was sound, and declined to modify its ruling.

Plaintiffs appealed to the Second Circuit Court of Appeals on several grounds of abuse of discretion. Argument

was presented in briefs prepared by pro-se plaintiffs and by the attorney for the defendant. The three-Judge panel of the Second Circuit bypassed all issues on appeal, but adopted the defense attorney's premise that the doctrine of res judicata should apply (as claimed by an affirmative defense in the Answer). The Appellate Panel then ordered dismissal on factual grounds of res judicata.

Plaintiffs petitioned the Second Circuit to reconsider its decision; noted that the Appellate decision contained false statements; and questioned whether the Appellate Court was entitled to make a factual determination [that the State action had been fully and fairly decided on its merits], and order dismissal on

grounds of res judicata, without evidentiary proceedings for that determination to have been made in the lower Court. Plaintiffs gave details on several reasons why the doctrine of res judicata could not apply in the instant action, using citations from the pleadings to demonstrate that point.

The petition was denied summarily, and the lower Court judgment was affirmed by mandate.

ARGUMENT

A writ of certiorari should be allowed by the United States Supreme Court because the issues entail a serious departure by the lower Courts from fundamental judicial principles, in a way

that can jeopardize all civil-rights cases that are potentially brought to the federal courts after the State courts had failed to protect federal rights.

Rule 12(h)(3) of the Federal Rules of Civil Procedure indicates that a trial judge may dismiss any Complaint merely on a perception:

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

This rule gives a federal trial judge power to act arbitrarily, and therein lies a serious threat to implementation of the nation's civil rights statutes.

All civil rights violations that occur within the proximate jurisdiction of a State court must first be pursued in that State court. If the State courts should fail to protect federal rights, jurisdiction then passes to the federal trial courts, as provided by Title 28 U.S.C. § 1343(a).

However, under the provisions of Rule 12(h)(3), the federal trial judge may merely note the existence of that earlier litigation, and then conclude that the matter does not belong in his court. He need only recite the regular jurisdictional structure wherein:

> decisions from the State courts shall be brought to the United States Supreme Court for purposes of appeal; and

> one trial court must give full faith and credit to the decision of another trial court.

Rule 12(h)(3) allows dismissal to occur at any time -- before the close of pleadings; before an evidentiary hearing; without sworn testimony. It strikes at the core of the civil judicial process by allowing, prior to trial, a presumption that statements in the defense pleadings are true, and those of the Complaint are false, thereby circumventing trial.

That is precisely what happened in the instant action.

The United States Supreme Court has given articulation on federal laws that modify the regular judicial structure whenever a case is brought to the federal

courts under the provisions of the civil rights acts. The federal trial courts are expressly given jurisdiction by Act of Congress in such cases, and the propriety of jurisdiction has been affirmed repeatedly by our highest Court in, for example:

Allen v. McCurry, 449 U.S. 90, 100, 101 (1980).

Kremer v. Chemical Construction Corp., 456 U.S. 461, 476, 482 (1981).

District of Columbia v. Carter, 409 U.S. 418, 428, 429 (1972).

Mitchum v. Foster, 407 U.S. 225, 242 (1971).

[These pages of the United States Reports are reproduced in the Appendix.]

Plaintiffs called these precedents to the attention of the federal District and Appellate Courts, but both Courts failed even to acknowledge their existence.

The District Judge concluded that his Court lacked jurisdiction to review the State Court judgment, and ruled on the basis of regular law; the Appellate Court then avoided relevant articulation by the United States Supreme Court, and the law of jurisdiction at issue, and ruled differently on allegations of fact that the federal courts had not reviewed nor allowed entered into evidence.

These decisions on federal matters by the District and Appellate Courts conflict with applicable decisions of the

United States Supreme Court, and have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Resolution of the question on rules can have broad impact in assuring fair and impartial implementation of the civil rights statutes in other cases brought to the federal courts after the State courts had failed to protect federal rights.

Petitioners therefore respectfully request that this Petition for Writ of Certiorari be granted.

Garret T. Bush, III and Helen F. Bush
723 Vauxhall St. Ext.
Waterford, CT 06385

18 February 1991

APPENDIX

(i) RULING AND ORDER DELIVERED UPON THE RENDERING OF JUDGMENT BY THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED, AS TRANSCRIBED:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Civil Action No. H-89-55 (AHN)

GARRET T. BUSH, III, ET AL
Plaintiffs,

VS.

WATER POLLUTION CONTROL AUTHORITY
FOR THE TOWN OF WATERFORD
Defendant.

Hearing held before the Honorable Alan H. Nevas, U.S.D.J., at the Federal Building located at 450 Main Street, Hartford Connecticut, on August 25, 1989.

PRELIMINARY HEARING OF DEFENSE

APPEARANCES:

Garret T. Bush, III
Representing the Plaintiffs
723 Vauxhall Street Ext.
Waterford, Connecticut 06385
PRO SE

LOCHIATTO & LAWRENCE
Representing the Defendant
P.O. Box 631
Mystic, Connecticut 06355
BY: LOIS J. LAWRENCE, ESQ.

DENISE D. HARPER-FORDE
Registered Professional Reporter
BRANDON REPORTING SERVICES
450 Main Street
Hartford, Connecticut 06103

[Ruling and order, page 40, line 14:]

* * *

The Court finds that the proceedings which took place in the Superior Court and in the Appellate Court, and the petition for certiorari to the Connecticut Supreme Court all resulted -- or that the original proceedings in the Superior Court constituted a hearing on the merits, and that the Plaintiff was given a trial on the merits.

A judgment of dismissal was entered; which was final order [sic]. That final order was appealed to the Connecticut Appellate Court. The Plaintiff, by his own admission here this morning, has indicated that he took many exceptions, and he raised 16 different issues, and in his appeal to the Connecticut Appellate Court that appeal was rejected.

He then petitioned for certiorari the Connecticut Supreme Court, and that was rejected. So it seems to me, the Plaintiff has had ample opportunities to raise all of these issues, and whatever issues he wished to raise in the context of the State Court proceedings.

The opinion of the Court is that all of those proceedings were all proceedings

in which there were hearings on the merits, and there was a judgment on the merits, as is evidenced by the language of the Connecticut Practice Book, Rule 302, which talks in terms of a dismissal if the Court believes that the Plaintiff has failed to make out a prima facie case; which the Connecticut Superior Court Judge did so find.

The 28 United States Court [sic], Section 1738, provides in pertinent parts as follows: "The records and judicial proceedings of any court of any state shall have the same full faith and credit in every court within the United States as they have by law or usage in the Court of such state."

I read this section to mean that this Court is required to give the same reclusive [sic] effect to a State Court judgment as would be given that judgment under the law of the State in which the judgment was rendered, and I cite Migia versus Wovern [sic] City School District (Phonetic), 465 US 75, at page 81-1984, United States Superior Court Case [sic]. Also, Allen versus McCorey [sic], (Phonetic), 449 US 90, pages 95 and 96. It's a 1980 case.

I believe that this finding goes to the Court's subject matter; jurisdiction subject [sic]. Jurisdiction is something that can be raised at any time during the course of the proceedings, and can be raised by the Court itself if the parties don't raise it, and the Court is in fact

raising the issue of subject matter jurisdiction here, because I have found that the State Court judgment was on the merits.

It's this Court's finding and conclusion that this Court lacks subject matter jurisdiction to review the final judgment of the State Court, and I cite DC Court of Appeals versus Feldman, 460 US 462, at page 482-1983 [sic], U.S. Supreme Court Case.

It seems to me that when the Plaintiff's Certiorari petition was denied by the Connecticut Supreme Court, the only avenue of review open to the Plaintiff was to petition to the U.S. Supreme Court.

So for all of those reasons, the Court of its own motion is going to enter an order of dismissal.

* * *

[transcript signed
6th Day of April, 1990]

Denise D. Harper-Forde
Registered Professional Reporter

- - - - - - - - -

(ii) OTHER RULING AND ORDER RENDERED IN THE CASE BY A COURT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of September, one thousand nine hundred and ninety.

Conn
H89-cv-
Nevas

PRESENT:
HONORABLE GEORGE C. PRATT,
HONORABLE J. DANIEL MAHONEY,
HONORABLE JOHN M. WALKER, JR.,
Circuit Judges.

- x

Docket No. 90-7238

GARRETT T. BUSH, III and
HELEN F. BUSH,
Plaintiffs-Appellants,
- against -

WATER POLLUTION CONTROL AUTHORITY
FOR THE TOWN OF WATERFORD,
Defendant-Appellee.

- x

This appeal from a final judgment of dismissal by the United States District Court for the District of Connecticut, Alan H. Nevas, Judge, was submitted on the transcript of the record.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment of dismissal is affirmed.

Garrett and Helen Bush sued this defendant in the state court of Connecticut, seeking to prevent the taking of a portion of their land, by eminent domain, for an easement to install a sewer pipe. The state court denied them relief and dismissed the action. The judgment was affirmed on appeal, and the Supreme Court of Connecticut declined to review the case. The Bushes then brought the defendant into federal court, claiming that the taking deprived them of due process as well as equal protection, and that the state courts had failed to protect their rights. The district court dismissed the complaint sua sponte for lack of subject matter jurisdiction. Plaintiffs appeal, arguing that the district court denied them due process, abused its discretion,

and was prejudiced against them. Regardless of the district court's basis for dismissal, we now affirm the dismissal on the ground of res judicata.

Both the constitution and 28 U.S.C. § 1738 require federal courts to give full faith and credit to state court judgments and to give them the same effect as would a court in the state where the judgment was rendered. U.S. Const., Art. IV, § 1; 28 U.S.C. § 1738; Migra v. Warren County School Dist. Bd. of Educ., 465 U.S. 75, 80-81 (1984); Allen v. McCurry, 449 U.S. 90, 94 (1980). In Connecticut, "[t]he doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which

were actually made or which might have been made." Gagne v. Norton, 189 Conn. 29, 32, 453 A.2d 1162 (1983); see Duhaime v. American Reserve Life Ins. Co., 200 Conn. 360, 364-65, 511 A.2d 333 (1986). The Bushes concede that they first brought this action in the state court; that it was fully litigated through the state court system; that there are no constitutional issues that were not or could not have been brought there; and that they lost.

Moreover, the action was decided on the merits, after a full hearing, when the state court dismissed the suit after finding for the defendant on the issues. The Bushes claim that the action was dismissed as a non-suit, and therefore not on its merits; however, they rely on

an outdated rule. Connecticut Practice Book Rule § 302, the basis for the state court's dismissal, was revised in 1978 to provide for dismissal when the plaintiff's evidence, taken as true, would not permit the trier of fact to decide the issues in the plaintiff's favor. Lorraine Hinchliffe v. American Motors Corp., 184 Conn. 607, 440 A.2d 810 (1981). Clearly, this was a judgment based on the merits of the case. Because this action was fully and fairly decided on its merits in state court, the Bushes may not now in federal court relitigate a state court judgment which they do not like. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983).

Finally, since in this federal action, the defendant raised the doctrine of res judicata as an affirmative defense in its answer, thereby putting the Bushes on notice of this potential ground for dismissal, they are not unfairly prejudiced by our dismissal of the action on that ground.

[s] George C. Pratt, U.S.C.J.
J. Daniel Mahoney, U.S.C.J.
John M. Walker, Jr., U.S.C.J.

FILED
SEP 19 1990
ELAINE B. GOLDSMITH, CLERK
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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(iii) ORDERS CONCERNING A REHEARING

(iii.1) DISTRICT COURT ORDER

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action, File Number H89-55 AHN

GARRET T. BUSH, III and
HELEN F. BUSH, Plaintiffs
v
WATER POLLUTION CONTROL AUTHORITY
FOR THE TOWN OF WATERFORD, Defendant

Endorsement Ruling on
Plaintiff's Motion to Reconsider

On August 25, 1989 the court dismissed this action sua sponte for lack of subject matter jurisdiction. The Clerk of the Court entered judgment for the defendant on August 29, 1989. The plaintiffs have moved the court, pursuant to 52 (b) and 59 (e), Fed. R. Civ. P., to reconsider its decision and

alter the judgment. The defendant opposes the motion.

The court grants the motion to reconsider but after review of the permanent court file and the parties' latest submissions declines to modify its August 25 ruling. Notwithstanding the plaintiff's challenge to the August 25 ruling, the court remains convinced that its reasoning is sound and its conclusion valid. The plaintiff's avenue of redress now leads to the appellate level.

In summary, though the court grants the plaintiffs' motion to reconsider and has reviewed all information relevant to the motion, it affirms its ruling of August 25, 1989 and the judgment of August 29, 1989.

SO ORDERED this 15th day of February, 1989 [sic] at Hartford, Connecticut.

[s] Alan H. Nevas, U.S.D.J.

FILED
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CLERK
U.S. DISTRICT COURT
HARTFORD, CONN

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(iii.2) APPELLATE COURT ORDER

United States Court of Appeals
for the
Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of December, one thousand nine hundred and ninety.

DOCKET NO. 90-7238

GARRET T. BUSH, III and HELEN F. BUSH,
Plaintiffs-Appellants,

v

WATER POLLUTION CONTROL AUTHORITY FOR THE TOWN OF WATERFORD,
Defendant-Appellee.

A motion for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

plaintiffs-appellants,
Garret T. Bush, III
and Helen F. Bush, pro se.

Upon consideration by the panel that decided the appeal, it is

ORDERED that the said motion for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been

transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

[s] Elaine B. Goldsmith,
Clerk

FILED
DEC 12 1990
ELAINE B. GOLDSMITH, CLERK
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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(iv) JUDGMENT DOCUMENT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL H-89-55 AHN

GARRET T. BUSH, III, ET AL.)
VS.)
WATER POLLUTION CONTROL)
AUTHORITY FOR THE TOWN OF)
WATERFORD)

JUDGMENT

This action having come on for consideration of a preliminary hearing on defense before the Honorable Alan H. Nevas, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having held a hearing on August 25, 1989, this action is dismissed on the Court's own motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut, this 29th day of August 1989.

KEVIN F. ROWE, Clerk
[s] By Dennis P. Iavarone
Deputy in Charge

FILED
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CLERK
U.S. DISTRICT COURT
HARTFORD, CONN

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(v) OTHER APPENDED MATERIALS

(v.1) EXCERPT FROM PLAINTIFFS' FEDERAL COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action, File Number H89-55 AHN

Complaint

GARRET T. BUSH, III and
HELEN F. BUSH, Plaintiffs
v
WATER POLLUTION CONTROL AUTHORITY
FOR THE TOWN OF WATERFORD, Defendant

I. PREFACE

1. This is an action of a civil nature brought by Garret T. Bush III and Helen F. Bush to redress the deprivation, under color of State law, of plaintiffs' right to hold property and receive equal protection of the laws, as secured by Amendment XIV, Section 1, of the Constitution of the United States. The district courts have original jurisdiction of this civil action pursuant to Title 28, USCS, Section 1343(a).

2. The case contests a condemnation action by defendant municipality -- a cause that plaintiffs have already pursued through all available levels of the Connecticut courts. Those courts in turn deprived plaintiffs of their civil

rights of due process and equal benefit of proceedings. * * *

FILED
JAN 31 922 AM '89
CLERK
U.S. DISTRICT COURT
HARTFORD, CONN

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(v.2) EXCERPT FROM PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action, File Number H89-55 AHN

Motion
3 September 1989

GARRET T. BUSH, III and
HELEN F. BUSH, Plaintiffs
v
WATER POLLUTION CONTROL AUTHORITY
FOR THE TOWN OF WATERFORD, Defendant

PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT, INCORPORATING BY REFERENCE PLAINTIFFS' MOTIONS DATED 28 AUGUST 1989 FOR AMENDMENT OF FINDINGS AND AMENDMENT OF JUDGMENT OF DISMISSAL, AND FOR RECONSIDERATION OF DISPOSITION OF DEFENDANT'S AFFIRMATIVE DEFENSES

1. Pursuant to Fed. R. Civ. P. 59(e) plaintiffs move the Court to vacate its Order, Judgment, and Decree entered on 29 August 1989; and to enter an Order for a hearing and reconsideration under this Motion and under plaintiffs' Motions of 28 August 1989, incorporated herein by reference. Plaintiffs respectfully request that the Court identify in its Order the specific Rule involved in its jurisdictional concerns, identify whether the issue is facial or factual, and (if factual) set forth a schedule for submitting additional affidavits and documents as may be desired. * * *

FILED
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CLERK
U.S. DISTRICT COURT
HARTFORD, CONN

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(v.3) EXCERPT FROM PLAINTIFFS' APPELLATE BRIEF

90-7238

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GARRET T. BUSH, III and
HELEN F. BUSH,
Plaintiffs - Appellants
-V-

WATER POLLUTION CONTROL
AUTHORITY FOR THE TOWN OF
WATERFORD,
Defendant - Appellee

APPEAL FROM JUDGMENT OF DISMISSAL OF COMPLAINT BY UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

BRIEF FOR PLAINTIFFS - APPELLANTS

For Plaintiffs

Garret T. Bush III
Helen F. Bush
723 Vauxhall St. Ext.
Waterford, CT 06385

For Defendant

Lois J. Lawrence
Lochiatto & Lawrence
P.O. Box 631
Mystic, CT 06355

26 April 1990

* * *

c. THE DISTRICT COURT MADE A PRECLUSIVE RULING THAT IS IN DIRECT CONFLICT WITH THE PROVISIONS OF 42 USC SECTION 1983 AND UNITED STATES SUPREME COURT PRECEDENT

The District Court Judge referred to two decisions of the United States Supreme Court in an attempt to set forth an authority for a preclusive ruling based on 28 USC Section 1738, as shown in lines 13-17 on page 42 of the transcript for 25 August 1989

(Supplemental Record Document 1).

The citations were:

Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75, 81; and

Allen v. McCurry, 449 U.S. 90, 95, 96.

In quick review, the District Court Judge had alleged that the existence of a certain judgment file in the State of Connecticut created a preclusion to subject-matter jurisdiction in the Federal District Court. An examination of the United States Supreme Court decisions cited by the District Court leads to a conclusion that is exactly opposite.

The United States Supreme Court in Migra at 81 said that a federal court

must give to a State court judgment the same preclusive effect as would be given that judgment under the law of the State in which judgment was rendered * * * IN THE ABSENCE OF FEDERAL LAW MODIFYING THE OPERATION OF SECTION 1738. (emphasis added)

The U.S. Supreme Court in Migra thus placed a limitation on the "full faith and credit" statute. A district court must be mindful of other federal laws that modify the operation of 28 USC Section 1738, such as 28 USC Section 1343(a) and 42 USC Section 1983 in suits involving the deprivation of Constitutional rights. Whenever the State courts refuse to adjudicate Constitutional issues action is specifically directed, not to

the U.S. Supreme Court, but to the federal district courts.

" *** Purpose of federal civil rights statute (42 USCS Section 1983) authorizing action at law, suit in equity, or other proper proceeding for redress of deprivation, under color of state law, of rights secured by Federal Constitution and federal laws, is to interpose federal courts between states and people, as guardians of people's federal rights, and thus to protect people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial ***

"Mitchum v. Foster, supra.

* * *

When the District Court Judge referred to Allen, supra, he failed to recognize that the U.S. Supreme Court had made a statement of how the CONSTITUTIONALITY of a prior State judgment affects new federal action based on 42 USC Section 1983.

In Allen v. McCurry, 449 U.S. 90, 100, 101 the opinion of the U.S. Supreme Court was voiced as follows: * * *

The district court is thus NOT barred by the full faith and credit statute from reaching merits of claim where merits of claim may have been previously litigated but not decided.

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RECEIVED
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
MAY 2 1990

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(v.4) EXCERPT FROM PLAINTIFFS' PETITION FOR REHEARING

90-7238

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GARRET T. BUSH, III and
HELEN F. BUSH,
Plaintiffs - Appellants

-V-

WATER POLLUTION CONTROL
AUTHORITY FOR THE TOWN OF
WATERFORD,
Defendant - Appellee

APPEAL FROM JUDGMENT OF DISMISSAL OF COMPLAINT BY UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

PLAINTIFFS' PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

For Plaintiffs

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1 October 1990

* * *

The Panel chose not to address the District Court's grounds for dismissal, or plaintiffs' three issues on appeal. Instead the Panel chose to affirm the lower court's action by ordering its own dismissal on the ground of res judicata, which had been claimed by defendant as an affirmative defense.

Plaintiffs ask the Honorable Court of Appeals to take notice of the precedents cited in Plaintiffs' Memorandum of 14 August 1989 * * *

- It is well settled that the courts must examine the record of prior proceedings to ascertain res judicata effect. * * *

- It is well settled that a defense of res judicata is not open for preliminary determination under the Federal Rules of Civil Procedure. * * *

Plaintiffs desire that the Honorable Court of Appeals give an explanation of how it can justify making a determination of res judicata during appellate review, when the case under appeal did not have the necessary evidence, nor had progressed sufficiently under the Rules for such a determination to have been made in the lower court. How could the

Honorable Court of Appeals conclude that the principle of res judicata should apply, without any supporting proof by affidavit, testimony, or evidentiary hearing to show that res judicata does apply? * * *

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
OCT 2 1990

(v.5) PAGES REPRODUCED FROM
UNITED STATES REPORTS

Allen v. McCurry, 449 U.S. 90
(pages 100 and 101)

Mitchum v. Foster, 407 U.S. 225
(pages 242 and 243)

District of Columbia v. Carter,
409 U.S. 418
(pages 428 and 429)

Kremer v. Chemical Construction
Corp., 456 U.S. 461
(pages 476, 477, 482, and 483)

tions that the state courts would retain their established jurisdiction so that they could, when the then current political passions abated, demonstrate a new sensitivity to federal rights.[16]

To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in *Monroe* v. *Pape*, *supra*, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was

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[16] Senator Edmunds, the floor manager of the bill in the Senate, observed at the end of the debates:

"The bill, like all bills of this character, in its first and second sections, is a declaration of rights and a provision for the punishment of conspiracies against constitutional rights, and a redress for wrongs. It does not undertake to overthrow any court. . . . It does not undertake to interpose itself out of the regular order of the administration of law. It does not attempt to deprive any State of the honor which is due the punishment of crime. It is a law acting upon the citizen like every other law, and it is a law to be enforced by the courts through the regular and ordinary processes of judicial administration, and in no other way, until forcible resistance shall be offered to the quiet and ordinary course of justice." Cong. Globe, 42d Cong., 1st Sess., 697–698 (1871).

Representative Coburn expressed his belief that after passage of the Act "the tumbling and tottering States will spring up and resume the long-neglected administration of law in their own courts, giving, as they ought, themselves, equal protection to all." *Id.*, at 460. Representative Sheldon noted:

"Convenience and courtesy to the States suggest a sparing use [of national authority] and never so far as to supplant the State authority except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed on them. . . . It seems to me to be sufficient, and at the same time to be proper, to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution. . . ." *Id.*, at 368.

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inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U. S., at 173–174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.*, at 176. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. See *supra*, at 95. But the Court's view of § 1983 in *Monroe* lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.[17]

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[17] The dissent suggests, *post*, at 112, that the Court's decision in *England* v. *Medical Examiners*, 375 U. S. 411, demonstrates the impropriety of affording preclusive effect to the state-court decision in this case. The *England* decision is inapposite to the question before us. In the *England* case, a party first submitted to a federal court his claim that a state statute violated his constitutional rights. The federal court abstained and remitted the plaintiff to the state courts, holding that a state-court decision that the statute did not apply to the plaintiff would moot the federal question. *Id.*, at 413. The plaintiff submitted both the state- and federal-law questions to the state courts, which decided both questions adversely to him. *Id.*, at 414. This Court held that in such a circumstance, a plaintiff who properly reserved the federal issue by informing the state courts of his intention to return to federal court, if necessary, was not precluded from litigating the federal question in federal court. The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-

courts, but whether this innovation was necessary or desirable.[32]

This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

V

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." *Ex parte Virginia*, 100 U. S., at 346. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young*, 209 U. S. 123; cf. *Truax* v. *Raich*, 239 U. S. 33; *Dombrowski* v. *Pfister*, 380 U. S. 479. For these reasons we conclude that, under the

[32] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., 361 (Rep. Swann); 385 (Rep. Lewis); 416 (Rep. Biggs); 429 (Rep. McHenry); App. 179 (Rep. Voorhees); 599–600 (Sen. Saulsbury); App. 216 (Sen. Thurman).

criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law.

In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger* v. *Harris*, 401 U. S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Stefanelli* v. *Minard*, 342 U. S. 117; *Cameron* v. *Johnson*, 390 U. S. 611. Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this § 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever.

The judgment is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join, concurring.

I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds

state courts to vindicate essential rights arising under the Constitution and federal laws." [21] *Zwickler* v. *Koota*, 389 U. S. 241, 245 (1967). With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.[22] Congressman Coburn explained: [23]

> "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . . We believe that we can trust our United States courts, and we propose to do so."

Thus, in the final analysis, § 1 of the 1871 Act may be viewed as an effort "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced

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the United States . . . ." Act of Mar. 3, 1875, § 1, 18 Stat. 470. The jurisdictional amount has since been raised from $500 to $2,000 by the Act of Mar. 3, 1887, § 1, 24 Stat. 552; to $3,000 by the Act of Mar. 3, 1911, § 24, 36 Stat. 1091; and to $10,000 by the Act of July 25, 1958, 72 Stat. 415. The provision is now codified as 28 U. S. C. § 1331 (a).

[21] The only exception was § 25 of the Judiciary Act of 1789, 1 Stat. 85, providing for Supreme Court review whenever a claim of federal right was denied by a state court.

[22] Thus, as originally enacted, § 1 of the 1871 Act provided that the proceedings authorized by the Act are "to be prosecuted in the several district or circuit courts of the United States. . . ." 17 Stat. 13. This aspect of § 1 is now codified as 28 U. S. C. § 1343 (3).

[23] Cong. Globe, 42d Cong., 1st Sess., 460.

and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S., at 180.

There was no need, however, to create federal court jurisdiction for the District of Columbia. Even prior to 1871, the courts of the District possessed general jurisdiction over both federal and local matters. Act of Mar. 3, 1863, c. 91, 12 Stat. 762. Thus, the jurisdictional aspects of § 1 of the 1871 Act were entirely superfluous with respect to the District. Moreover, while Congress was unable to exert any direct control over the actions of state officials, it was authorized under Art. I, § 8, cl. 17, of the Constitution to exercise plenary power over the District of Columbia and its officers.[24] Indeed, "[t]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs." *Berman* v. *Parker*, 348 U. S. 26, 31 (1954); see *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 108 (1953); *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582, 602 (1949); *Kendall* v. *United States*, 12 Pet. 524, 619 (1838). And since the District is itself the seat of the National Government, Congress was in a position to observe and, to a large extent, supervise the activities of local officials.[25] Thus, the rationale underlying Con-

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[24] In pertinent part, Art. I, § 8, cl. 17, of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of Government of the United States . . . ."

[25] The District of Columbia police system, for example, was operated under the direction of a board of five commissioners appointed by the President with the advice and consent of the Senate. The statutes creating the metropolitan police system established a network of regulations and reporting requirements that enabled the

Senator Williams, another proponent of the 1972 bill, echoed Senator Javits' remarks: "I do not believe that the individual claimant should be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again." *Id.*, at 3372. After Senator Javits and Senator Williams spoke, an evenly divided Senate refused to approve the Hruska amendment.

It is sufficiently clear that Congress, both in 1964 and 1972, though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws. We conclude that neither the statutory language nor the congressional debates suffice to repeal § 1738's longstanding directive to federal courts.

B

Our finding that Title VII did not create an exception to § 1738 is strongly suggested if not compelled by our recent decision in *Allen* v. *McCurry* that preclusion rules apply in 42 U. S. C. § 1983 actions and may bar federal courts from freshly deciding constitutional claims previously litigated in state courts. Indeed, there is more in § 1983 to suggest an implied repeal of § 1738 than we have found in Title VII. In *Allen*, we noted that "one strong motive" behind the enactment of § 1983 was the "grave congressional concern that the state courts had been deficient in protecting federal rights." 449 U. S., at 98–99. Nevertheless, we concluded that "much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Id.*, at 99.

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ceedings, Senator Javits' comments "should in context also be read as excluding state proceedings from any application of res judicata in Title VII suits." Reply Brief for Petitioner 9, n. **. Not only is the idea that even a full state judicial proceeding be excluded from res judicata effect implausible on its face, but Senator Javits prefaced his res judicata statement by discussing the very New York employment discrimination laws under which Kremer proceeded. 118 Cong. Rec. 3370 (1972).

Because Congress must "clearly manifest" its intent to depart from § 1738, our prior decisions construing Title VII in situations where § 1738 is inapplicable are not dispositive. They establish only that *initial resort* to state administrative remedies does not deprive an individual of a right to a federal trial *de novo* on a Title VII claim. In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Chandler* v. *Roudebush*, 425 U. S. 840 (1976), we held that the "civil action" in federal court following an EEOC decision was intended to be a trial *de novo*. This holding, clearly supported by the legislative history, is not a holding that a prior state court judgment can be disregarded.

The petitioner and the Courts of Appeals which have denied res judicata effect to such judgments rely heavily on our statement in *Alexander* v. *Gardner-Denver* that "final responsibility for enforcement of Title VII is vested with federal courts." 415 U. S., at 44.[11] We did not say, and our language should not be read to imply, that by vesting "final responsibility" in one forum, Congress intended to deny finality to decisions in another. The context of the statement makes this clear. In describing the operation of Title VII, we noted that the EEOC cannot adjudicate claims or impose sanctions; that responsibility, the "final responsibility for enforcement," must rest in federal court.

The holding in *Gardner-Denver* was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts. Arbitration decisions, of course, are not subject to the mandate of § 1738. Furthermore, unlike arbitration hearings under collective-bargaining agreements, state fair employment practice laws are explicitly made part of the Title VII enforcement scheme. Our decision in *Gardner-Denver* explicitly recognized the "distinctly separate nature of these contractual and statutory rights."

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[11] See, *e. g.*, *Smouse* v. *General Electric Co.*, 626 F. 2d, at 334–335; *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d, at 1082–1083.

fect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. *McElmoyle* v. *Cohen*, 13 Pet. 312, 326 (1839); *Mills* v. *Duryee*, 7 Cranch 481, 485 (1813). As we recently noted in *Allen* v. *McCurry*, *supra*, "though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." 449 U. S., at 96.

The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment,[22] and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the State from which the judgment emerged. In such a case, there

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petitioner's Title VII suit whether his Title VII claim is precluded by the New York judgment or whether he is collaterally estopped by that judgment from complaining that Chemico had discriminated against him. Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes, *Nash County Bd. of Ed.* v. *Biltmore Co.*, 640 F. 2d 484, 488 (CA4), cert. denied, 454 U. S. 878 (1981). See also Restatement (Second) of Judgments § 61(1) (Tent. Draft No. 5, Mar. 10, 1978); Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 340–341 (1978). It may be that petitioner would be precluded under res judicata from pursuing a Title VII claim. However that may be, it is undebatable that petitioner is at least estopped from relitigating the issue of employment discrimination arising from the same events.

[22] Cf. *McDonald* v. *Mabee*, 243 U. S. 90, 92 (1917) ("[A]n ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it"); *Haddock* v. *Haddock*, 201 U. S. 562, 567, 568 (1906).

could be no constitutionally recognizable preclusion at all.[24]

We have little doubt that Kremer received all the process that was constitutionally required in rejecting his claim that he had been discriminatorily discharged contrary to the statute. We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 610 (1974); *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710 (1945). "'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Mitchell* v. *W. T. Grant Co.*, *supra*, at 610 (quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961)). Under New York law, a claim of employment discrimination requires the NYHRD to investigate whether there is "probable cause" to believe that the complaint is true. Before this determination of probable cause is made, the claimant is entitled to a "full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony." *State Div. of Human Rights* v. *New York State Drug Abuse Comm'n*, 59 App. Div. 2d 332, 336, 399 N. Y. S. 2d 541, 544 (1977). The complainant also is entitled to an opportunity "to rebut evidence submitted by or obtained from the respondent." 9 N. Y. C. R. R. § 465.6 (1977). He may have an attorney assist him and may ask the division to issue subpoenas. 9 N. Y. C. R. R. § 465.12(c) (1977).

If the investigation discloses probable cause and efforts at conciliation fail, the NYHRD must conduct a public hearing

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[24] The Court's decisions enforcing the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, also suggest that what a full and fair opportunity to litigate entails is the procedural requirements of due process. *Sherrer* v. *Sherrer*, 334 U. S., at 348 ("there is nothing in the concept of due process which demands that a defendant be afforded a second opportu-